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AHMAD SUHAIRI MAT ALI v. CIMB BANK BHD & ANOR

HIGH COURT MALAYA, PULAU PINANG
KENNETH ST JAMES JC
[JUDICIAL REVIEW NO: PA-25-50-08-2019]
27 OCTOBER 2022

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Abstract – *An application for stay of execution involves striking a judicious and equitable balance between the principle that the successful party ought to reap the fruits of the litigation whilst the unsuccessful party should not be deprived if the subsequent appeal is in his favour. In order to strike a balance, the courts are more inclined to explore a partial conditional stay to balance the competing rights, interest, needs and concerns of the parties without offending the general principles pertaining to granting of stay.*

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CIVIL PROCEDURE: *Stay of execution – Stay pending appeal – Employee obtained order against employer in his favour – Employer's appeal pending – Whether special circumstances to justify stay disclosed – Whether employee denied fruits of successful litigation if stay allowed – Whether execution of judgment would render appeal nugatory – Whether employer able to recover judgment sum if appeal successful – Whether balance of convenience tipped in favour of employer – Whether conditional stay justified in circumstances of case*

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The applicant, an employee of the first respondent ('bank') for 22 years, asserted that the bank had constructively dismissed him. An Industrial Court ('IC') case ensued. The IC handed down an award against the applicant. Dissatisfied, the applicant filed for judicial review. The High Court substituted the IC award with an order that the bank paid the applicant the judgment sum of RM442,117.20 as the net sum of backwages and compensation *in lieu* of reinstatement ('HC order'). The bank appealed against the HC order to the Court of Appeal and accordingly, filed this application for a stay of execution on the grounds, *inter alia*: (i) there were special circumstances that compelled the court to exercise its discretion to grant a stay because the bank's appeal would be rendered nugatory if the HC order was executed or enforced; (ii) there was likelihood that the bank would be denied the fruits of its appeal if the judgment sum was disposed of by the applicant; (iii) the applicant was not prejudiced as the bank had the means to pay the judgment sum; and (iv) the balance of convenience was in favour of the bank, as the judgment sum could be deposited into a stakeholder's account until the disposal of the appeal.

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Held (granting conditional stay order):

(1) The bank's affidavit in support failed to disclose any special or extraordinary circumstances that justified the grant of a stay. Instead, it disclosed the bank's preparedness to place the judgment sum in an account managed by the applicant's counsel. This meant that the applicant would be made to wait until the outcome of the appeal, contrary to the principle that the successful litigant should be allowed to enjoy the fruits of his litigation. The bank also did not propose to pay the applicant the costs awarded in the applicant's favour, thus, indicating that the bank did not intend to pay over to the applicant any sum of money to satisfy the judgment sum and the costs awarded. Further, the bank did not elaborate as to how and why the appeal would be rendered nugatory and academic if the HC order was enforced. (paras 30, 32-34 & 36)

(2) There was no evidence that showed that the applicant would not, or would not be able to, return the judgment sum to the bank. The applicant's positive assertions that he was able to return the money, and that he had no financial problems throughout the IC and HC proceedings, were not refuted by the bank. It was nothing more than the bank's speculative fear that it may not be able to recover the judgment sum from the applicant if the bank ultimately wins its appeal. This fear could hardly be tantamount to a special circumstance that necessitated a stay of the HC order. (paras 38-41)

(3) The applicant, despite losing at the IC, persevered with the judicial review at the HC which decided in his favour. The applicant should be allowed to timeously enjoy the favourable outcome of more than nine years of litigation. A stay of the payment of the judgment sum to the applicant was indeed a prejudice caused upon him. Accordingly, the court was not moved to grant a total or absolute stay. (paras 43 & 44)

(4) The bank's ability to pay the judgment sum and its willingness to place the judgment sum in an account did not tip the balance of convenience nor the balance of justice in the bank's favour. If the judgment sum, which was rightfully the applicant's, was placed in an account, the applicant would continue to be denied the fruits of his successful litigation. Hence, it would be favourable to the bank for the court to order part of the judgment sum to be deposited into an interest-bearing clients' account, to be dealt with when there was an outcome in the appeal. This would preserve at least half of the judgment sum from being disposed of and irrecoverable and would cause no prejudice to the bank. At the same time, the applicant would get to enjoy the fruits of his litigation, part of which was for the arrears in backwages. Therefore, the court, instead of granting a total and absolute stay or wholly refusing a stay, granted a conditional stay. (paras 46-49 & 51)

Case(s) referred to:
Chan Hak Foon v. Sutera Harbour Resort Sdn Bhd & Anor [2009] 9 CLJ 109 HC ***(foll)***
Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd [2013] 3 CLJ 47 CA ***(refd)***
Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***
Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***
Renew Capital Sdn Bhd & Ors v. ADM Ventures (M) Sdn Bhd & Anor And Another Appeal [2022] 8 CLJ 817 CA ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 73
Rules of Court 2012, O. 45 r. 11

For the applicant - Pravin Kaur Jessy; M/s Meghala & Co
For the 1st respondent - David Tan Seng Keat; M/s T Thavalingam & Co

Reported by S Barathi

JUDGMENT
(Application For Stay Of Execution)

Kenneth St James JC:

Prelusion

[1] The applicant (employee) lost in the Industrial Court. The applicant filed for judicial review in the High Court, to quash the Industrial Court award. The applicant won in the High Court. The High Court substituted the Industrial Court award with an order that the first respondent (the employer bank) pays the applicant the judgment sum of RM442,117.20 as the net sum of back wages and compensation *in lieu* of reinstatement. As well as costs of RM10,000.

[2] The bank appealed to the Court of Appeal. The bank then filed this application for a stay of execution pending its appeal. I granted a conditional stay of the execution of the judgment sum. The bank has now appealed against the order for a conditional stay.

[3] The distinctive issue here is that the order made was for a conditional stay (a stay of the execution of a part of the judgment sum), as opposed to a complete stay (a stay of the execution of the entire judgment sum). Here are my reasons for ordering a conditional stay.

The Undisputed Facts And Events

[4] The applicant worked for the bank for approximately 22 years. His last monthly salary was RM10,731, with a RM750 car allowance.

[5] Because of various events that happened, the applicant wrote to the bank to assert that the bank constructively dismissed him. This was in July 2012. An Industrial Court case ensued.

[6] The Industrial Court case started around August 2013. The Industrial Court handed down its award in May 2019. It was against the applicant.

[7] Being dissatisfied, the applicant filed for judicial review. The High Court delivered its judgment in July 2021 (13 July 2021 order) and ordered the bank to pay the applicant the judgment sum, with costs.

[8] The bank appealed against the High Court order to the Court of Appeal. And accordingly filed this application for a stay of execution.

The Terms Of The Bank's Stay Application

[9] The bank's application prays:

(i) that all execution and enforcement proceedings arising out of the 13 July 2021 order be stayed pending the disposal of its appeal to the Court of Appeal;

(ii) in the alternative, that all execution and enforcement proceedings arising out of the 13 July 2021 order be stayed for an interim period of one month for the bank to file a stay application in the Court of Appeal.

The Bank's Grounds For A Stay Of Execution

[10] The bank's pertinent grounds for a stay of execution include:

(i) there are special circumstances that compel this court to exercise its discretion to grant a stay because the bank's appeal will be rendered nugatory if the 13 July 2021 order is executed or enforced;

(ii) there is a likelihood that the bank will be denied the fruits of its appeal if the judgment sum is disposed of by the applicant;

(iii) the applicant is not prejudiced as the bank has the means to pay the judgment sum;

(iv) the balance of convenience or the balance of justice are in favour of the bank, as the judgment sum can be deposited in a stakeholder's account until the disposal of the appeal.

Principles Relevant For This Stay Application

[11] There are several principles that I am to consider and bound to apply, in this stay application. First, an appeal will not operate as a stay of execution, unless the court orders a stay: s. 73 of the Courts of Judicature Act 1964.

[12] The relevant portion of s. 73 provides as follows:

> **Section 73. Appeal not to operate as stay of execution.**
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> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders …

[13] Second, the court should not deprive the successful party (here: the applicant) the fruits of his litigation, pending the losing party's appeal to an appellate court, unless there are "special circumstances" to warrant a stay. In other words, the successful party should not be made to wait for the outcome of the opposite party's appeal, before he can enjoy the relief or remedy granted to him, unless there are "special circumstances" that compel the grant of a stay: *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1; [2004] 1 MLJ 257, [2003] 5 AMR 758 and *Renew Capital Sdn Bhd & Ors v. ADM Ventures (M) Sdn Bhd & Anor And Another Appeal* [2022] 8 CLJ 817; [2022] 6 MLJ 58 (CA), [2022] 5 AMR 353.

[14] In *Kosma Palm Oil Mill* (*supra*), the Federal Court, through Justice Augustine Paul JCA (as he was then) held as follows:

> The general rule is that an appeal shall not operate as a stay of execution unless the court so orders. Accordingly, as Brown J said in *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116 while commenting on the discretion to grant a stay:
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> > But it is a clear principle that **the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined,** unless the unsuccessful party can show special circumstances to justify it. (emphasis added)

[15] In *Renew Capital* (*supra*), the Court of Appeal, through Justice Lee Swee Seng JCA, while citing and discussing *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380, [2002] 3 MLJ 49, [2002] 3 AMR 2867, enunciated this:

> [24] Thus it has been said ever so often that **a successful litigant is generally not to be deprived of the fruits of his litigation.** The law does not require that the unsuccessful litigant who is minded to appeal must be allowed to exhaust all avenues and tiers of appeal before the successful litigant, armed with a judgment of the court, especially for the payment of a judgment debt, may proceed with the execution of the judgment debt. (emphasis added)

[16] Third, the party who is applying for a stay of execution must set out the special circumstances that warrant a stay, by affidavit evidence. And the special circumstances must relate to the execution or enforcement of the judgment: *Kosma Palm Oil Mill* (*supra*).

[17] The Federal Court in *Kosma Palm Oil Mill* (*supra*) said:

> 23 The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. **The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application** (see *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406). Where it is alleged that there is a danger of

> the unsuccessful party not being repaid if its appeal is successful for any reason like, for instance, the insolvency of the other party, this must be shown in the affidavit (see *The Annot Lyle* (1886) 11 PD 114).
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> (emphasis added)

[18] Fourth, the courts have an unfettered discretion whether to grant a stay, as long as the discretion is exercised judiciously: *Jagdis Singh Banta Singh v. Outlet Rank (M) Sdn Bhd* [2013] 3 CLJ 47, [2013] 4 MLJ 213 (CA).

[19] In *Jagdis Singh* (*supra*), the Court of Appeal, through Justice Mohd Zawawi Salleh JCA propounded:

> [22] Now, what factors or principles will, and should, guide the courts in applications for a stay of an order granted by a court … The factors or principles so enumerated are inexhaustive, and not all of them are applicable to every case. Each has its own peculiar principle. Some of the principles to be considered in the motions may be stated as follows:
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> (a) **the courts have an unimpeded discretion to grant or refuse stay.** In this, like in all other instances of discretion, the court is bound to exercise that discretion both judicially as well as judiciously and not erratically (see *Serangoon Garden Estate Ltd v. Ang Keng* [1953] 1 MLJ 116; *Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86) …
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> (emphasis added)

[20] Fifth, the court has the power and the discretion to grant a stay "on such terms as it thinks fit": Order 45 r. 11 of the Rules of Court 2012. This means that I can order a conditional stay.

[21] Order 45 r. 11 is set out here:

> **Matters occurring after judgment: Stay of execution (O. 45 r. 11)**
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> 11. Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and **the Court may by order grant such relief, and on such terms, as it thinks fit.** (emphasis added)

[22] Sixth, I am to consider the principle of not depriving the successful party the fruits of his litigation in this manner-where the judgment is a monetary judgment, if I grant a stay, the successful party will have to wait until the disposal of the losing party's appeal before the successful party can get the judgment sum; and this is only if the successful party succeeds again in the appeal; also, the successful party probably still has to file execution proceedings before he can get the judgment sum. This circumstance tantamount to depriving the successful party the fruits of his litigation.

[23] On the other hand, if I refuse a stay, the successful party will insist on being paid the judgment sum immediately. Then if the losing party pays over the judgment sum, but succeeds on appeal, the judgment sum has to be

returned. The plaintiff/applicant, who was paid the judgment sum, may resist returning it to the defendant/respondent. The tables are now turned and the defendant now has to file proceedings to recover the judgment sum. This converse circumstance also tantamount to depriving the successful party the fruits of his litigation.

[24] I must take into account the relevant factors, as well as balance the rights and interests of the competing parties, and consider granting a stay on terms *ie*, a conditional stay. In other words, I am not confined or compelled to only grant or refuse an outright stay. I can and should consider granting a conditional stay, if it is more equitable to do so: *Renew Capital* (*supra*).

[25] In *Renew Capital* (*supra*), the Court of Appeal stated these views:

> [31] This dilemma was captured in the *dicta* of Vincent Ng J (later JCA) in *Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd* [2000] 6 MLJ 493; [2000] 3 CLJ 361 where His Lordship observed thus:
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> > *The justice of the case on stay is arrived at by striking a judicious and equitable balance* between the principle that the successful party in the litigation ought to be allowed to reap the fruits of that litigation and not obtain a mere barren success, and the countervailing principle that should the unsuccessful party in litigation be ultimately successful in his appeal, he ought not be deprived of the fruits of his litigation due to the result of his appeal being rendered nugatory.
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> [32] *Courts have increasingly been more inclined to explore a partial conditional stay upon terms to balance the competing rights, interest, needs and concerns of the parties* without offending the general principle that generally a party [to] a successful litigation even at first instance is entitled to the fruit of its litigation unless 'special circumstances' can be shown by the unsuccessful party that is appealing.
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> [39] There are various factors that the court may consider in the exercise of its discretion to grant a stay, whether it be unconditional or conditional. It involves *a fine balancing exercise in weighing and considering the relevant factors for and against a stay and if conditions are imposed, the reasonable conditions having in mind the rights, interests, needs and concerns of the parties* …
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> [64] Whilst the circumstances may not justify an unconditional stay, nevertheless *the court in the exercise of its discretion may explore whether the circumstances may justify a conditional stay of either the whole or part of the judgment debt and if so the conditions that may be fair and reasonable having regard to all relevant factors.*
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> [90] Mere words of assurance that the sum paid would be safe is not good enough for words are cheap and one must be prepared to give a more tangible assurance that what is paid would be recoverable. This is where this *court would need, having regard to the realities of the circumstances and the rights, interests, needs and concerns of the parties, to explore factors that it may have*

regard to for a conditional stay that would promote business efficacy and prevent money paid from being irrecoverable when one should ultimately be successful though having lost at first instance.

(emphasis added)

Are There Special Circumstances That Compel The Grant Of A Stay?

[26] I find that the affidavit in support of the bank's application for stay does not disclose any facts that demonstrate special circumstances that justify a stay of execution.

[27] The affidavit in support merely refers to and exhibits the application for judicial review, the 13 July 2021 order for the bank to pay the judgment sum to the applicant, the bank's notice of appeal to the Court of Appeal, and the bank's solicitors' two letters dated 22 July 2021 and 23 August 2021.

[28] By these two letters, the bank proposed to deposit the judgment sum of RM442,117.20 into an interest-bearing stakeholders' account that is held either by the bank's solicitors or by the applicant's counsel.

[29] The bank's letters are, in effect, a proposal to the applicant to agree to a conditional stay, that is, the applicant is not to execute the judgment sum against the bank, as the money is now preserved in a bank account, to be released only when there is an outcome in the bank's appeal.

[30] The affidavit in support fails to disclose any special or extraordinary circumstances that justify the grant of a stay. Instead, what the affidavit in support discloses is the bank's preparedness to place the judgment sum in an account that is managed by the applicant's counsel. This will secure the judgment sum until the outcome of the bank's appeal.

[31] If the bank loses in the appeal, the judgment sum will be released to the applicant. If the bank succeeds in the appeal, the judgment sum can immediately be returned to the bank without any further legal proceeding to recover the money.

[32] But this would mean that the applicant is made to wait until the outcome of the bank's appeal, instead of being allowed to promptly reap the benefit of the judgment sum. This is contrary to the principle that the successful litigant should be allowed to enjoy the fruits of his litigation.

[33] I also note that the bank does not propose to pay the applicant the RM10,000 cost that was awarded in favour of the applicant in the judicial review proceeding. This indicates to me that the bank does not intend to pay over to the applicant any sum of money to satisfy the judgment sum and the costs awarded.

[34] Further, within this ground, the bank mentions that its appeal will be nugatory and rendered academic if the 13 July 2021 order is enforced. But the bank does not elaborate as to how and why its appeal will be nugatory and rendered academic.

[35] I am left to take it that what the bank meant is that if it pays over the judgment sum to the applicant, and the bank wins its appeal, it may not be able to recover the judgment sum from the applicant. But again, the bank does not aver as to what it is about the circumstances, or about the state or conduct of the applicant, that will cause the bank to be unable to recover the money back from the applicant.

[36] And so I find that the bank has not demonstrated that there are special circumstances to justify a stay.

Will The Bank Be Denied The Fruits Of Its Appeal If The Applicant Disposes The Judgment Sum?

[37] The applicant is entitled to utilise the judgment sum in any way that he chooses to. The bank's argument is that the applicant will not return the judgment sum if the bank ultimately succeeds in its appeal.

[38] I find, however, that there is no evidence that shows that the applicant will not, or will not be able to, return the judgment sum to the bank. In the applicant's affidavit in reply to oppose this stay application, the applicant made positive assertions that he is able to return the money, and that he has had no financial problems throughout the Industrial Court and High Court proceedings.

[39] At paras. 7.2 and 7.32 respectively of his affidavit in reply, the applicant averred:

> (1) … saya akan dapat mengembalikan wang kepada Responden Pertama (the Bank) sekiranya rayuan yang difailkan Responden Pertama dibenarkan (yang dinafikan) oleh Mahkamah Rayuan; dan
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> (2) Saya tidak mempunyai apa-apa masalah kewangan dan selepas menunggu selama hampir 9 tahun 2 bulan selepas saya ditamatkan perkhidmatan secara konstruktif pada 18/7/2012 sehingga ke tarikh hari ini dan memandangkan wabak Covid-19 yang sedang merebak, saya berharap untuk menikmati hasil kemenangan saya sementara saya masih boleh menikmatinya.

[40] These averments were not refuted by the bank.

[41] And so I am behoved to hold that this ground is nothing more than the bank's speculative fear that it may not be able to recover the judgment sum from the applicant, if the bank ultimately wins its appeal. This fear can hardly be tantamount to a special circumstance that necessitates a stay of the 13 July 2021 order.

Is The Applicant Prejudiced If A Stay Is Granted?

[42] The bank argues that the applicant is not prejudiced because the bank has the means to pay over the judgment sum and the bank proposes to place it in an interest-bearing account to safeguard it.

[43] I am not convinced that the applicant is not prejudiced on this ground. On the contrary, I find that the applicant is indeed prejudiced. The applicant pursued an Industrial Court case. Although he lost at the Industrial Court, the applicant persevered with judicial review at the High Court. The High Court held in his favour and ordered the bank to pay him backwages and compensation. The applicant should be allowed to timeously enjoy the favourable outcome of more than nine years of litigation. A stay of the payment of the judgment sum to the applicant is, in my view, indeed a prejudice caused upon him.

[44] Accordingly, I am not moved to grant a total or absolute stay on this ground.

Is The Balance Of Convenience Or Balance Of Justice In Favour Of The Grant Of A Stay?

[45] The bank argues that the balance of convenience or the balance of justice favours the bank, in that the bank is willing to place the judgment sum in an account to preserve the money from being disposed of, pending the outcome of the appeal.

[46] In my judgment, this submission is untenable. The bank's ability to pay the judgment sum and the bank's willingness to place the judgment sum in an account do not tip the balance of convenience nor the balance of justice in the bank's favour. It is not more convenient or fairer to the parties just because the judgment sum is placed in an account.

[47] The competing positions are these – if the judgment sum, which is rightfully the applicant's, is placed in an account, the applicant will continue to be denied the fruits of his successful litigation. On the other hand, placing the judgment sum in an account will effectively extinguish the risk that the bank will not be able to recover the judgment sum from the applicant if the bank wins its appeal, as the money never reached the applicant's hands.

[48] This leads me to my rationale. If the bank fears that the applicant will dispose of the judgment sum if it is paid over to him, making it irrecoverable if the bank ultimately wins its appeal – then it is actually favourable to the bank if I were to order part of the judgment sum (for instance: half of it) to be deposited into an interest-bearing clients' account, to be dealt with when there is an outcome in the appeal. This will preserve at least half of the judgment sum from being disposed of and irrecoverable. This causes no prejudice to the bank.

[49] At the same time, the applicant will get to enjoy the fruits of his litigation. He will get to utilise half the judgment sum: RM221,058.60, which is by any means a substantial sum. I bear in mind here that part of the judgment sum is for the arrears in backwages-money that was supposed to be paid to him but was in fact not paid to him.

[50] So, a substantial sum of RM221,058.60 is preserved and secured in a clients' account (which comes with it the safeguard of the solicitors' statutory and inherent duties over the money). At the same time, another substantial sum of RM221,058.60 is released to the applicant, who succeeded in his judicial review proceeding, and who is waiting to reap the successful outcome of his legal pursuit.

A Conditional Stay Or A Stay On Terms

[51] Instead of granting a total and absolute stay, or wholly refusing a stay, I am granting a conditional stay. I am guided by the precedent of *Chan Hak Foon v. Sutera Harbour Resort Sdn Bhd & Anor* [2009] 9 CLJ 109 (HC), [2009] MLJU 423, where Justice David Wong Dak Wah J (later CJSS) granted a stay pending appeal, conditional upon terms that include the deposit of a sum of money into an interest-bearing solicitors' clients' account.

[52] I am also guided and bound by the authority of *Renew Capital* (*supra*), to consider the competing "rights, interests, needs and concerns of the parties" and to have regard to the "realities of the circumstances" facing the parties, which led me to grant a conditional stay here.

[53] For all these reasons, I grant a conditional stay order on these terms:

(i) The execution or enforcement of the 13 July 2021 order is stayed pending the disposal of the bank's Court of Appeal Appeal No. P-01(A)-403-07-2021 (the bank's appeal) on the following conditions:

(a) the bank is to pay, by 30 September 2022, the sum of RM221,058.60 into the applicant's solicitors' interest-bearing clients' account, to be managed by the applicant's solicitors. This sum will be dealt with appropriately according to the outcome of the bank's appeal;

(b) the bank is to pay, by 30 September 2022, the sum of RM221,058.60 with the costs of RM10,000 which was granted in the 13 July 2021 order, to the applicant by paying these two sums to the applicant's solicitors on account for the applicant, for transmission to the applicant;

(ii) the bank is to pay, by 30 September 2022, costs of RM5,000 for this proceeding to the applicant by paying this sum to the applicant's solicitors on account for the applicant, for transmission to the applicant.